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September 29, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: Comments on Request to Open Application Window
MM Docket No. 96-163; RM-8841

Dear Mr. Caton:

Transmitted herewith on behalf of D. Mitchell Self Broadcasting, Inc., applicant for a new FM broadcast station to operate on Channel 293A at Clifton, Tennessee, are an original and four copies of its "Comments on Request to Open Application Window," filed in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,



Andrew S. Kersting
Counsel for
D. Mitchell Self Broadcasting, Inc.

Enclosures
cc (w/ encl.): Certificate of Service

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BEFORE THE

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SEP 29 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 96-163
Table of Allotments,) RM-8841
FM Broadcast Stations,)
(Clifton, Tennessee))

To: Chief, Allocations Branch
Mass Media Bureau

COMMENTS ON REQUEST TO OPEN APPLICATION WINDOW

D. Mitchell Self Broadcasting, Inc. ("Self"), applicant for a new FM broadcast station to operate on Channel 293A at Clifton, Tennessee, by counsel, hereby submits the following comments on the "Request to Open Application Window," filed September 4, 1997 ("Request"), by Clifton Broadcasting Company ("CBC").¹ In support of these comments, the following is stated:

I.

Statement of Facts and Procedural History

On October 18, 1996, the Chief, Allocations Branch, adopted a *Report and Order* in MM Docket No. 96-163, allotting Channel 293A to Clifton, Tennessee, as that community's first local transmission service ("*Order*"). A summary of the *Order* was published in the *Federal Register* on

¹ As explained in greater detail herein, CBC's Request is inextricably related to a Petition for Reconsideration Self filed on September 25, 1997, requesting that the Audio Services Division reinstate Self's application for the Channel 293A facility at Clifton, Tennessee, which was filed on July 7, 1997 (File No. BPH-970707MG). Self's comments on CBC's Request are being filed only two business days after Self filed its Petition for Reconsideration. Thus, consideration of these comments will not materially delay the Commission's resolution of this matter, nor will it prejudice any party to this proceeding.

November 6, 1996.² See 61 Fed.Reg. 57336 (copy attached hereto as Attachment A). Although the summary stated that the *Order* was released on October 25, 1996, the *Order* apparently has not been properly “released” by the Commission.

Following publication of the *Order* in the *Federal Register*, Self contacted the Allocations Branch on several occasions in an effort to determine whether the *Order* was going to be released, or whether the Branch intended to issue some form of an erratum. The Allocations Branch advised Self that because the *Order* already had been published in the *Federal Register*, the Branch did not intend to release the *Order*, no erratum would be issued, and no further action would be taken concerning the *Order*.

Self then reviewed the Commission’s files to determine whether any applications had been filed for the Clifton facility. Upon finding that no applications had been filed in response to the *Order*, Self filed an application for the Clifton facility on July 7, 1997, with the understanding that it would constitute a “first come/first serve” application under Section 73.3573(g)(3) of the Commission’s rules. See 47 CFR §73.3573(g)(3). However, by letter dated August 12, 1997, Claudette E. Pride, Chief, Fee Section, returned Self’s application and the accompanying filing fee because, according to the FCC’s Fee Section, the application had been filed against a filing window that had not opened. See Attachment B. See also *Public Notice*, Report No. 44063, p. 12 (released

² The summary detailed all of the essential information contained in the *Order*, including the following: (i) identified Self as the petitioner; (ii) announced the allotment of Channel 293A to Clifton, Tennessee; (iii) noted a site restriction of 10.6 kilometers (6.6 miles) northwest of the community; (iv) specified the coordinates for the new allotment; (v) stated that the proceeding was being terminated and announced an effective date of December 9, 1996, for the new rule; (vi) stated that the window period for filing applications would open December 9, 1996, and close on January 9, 1997; and (vii) provided the name and telephone number of a Commission staff person from whom further information concerning the *Order* could be obtained. 61 Fed.Reg. 57336 (November 6, 1996).

August 26, 1997) (announcing the return of Self's application). As stated above, Self filed a Petition for Reconsideration on September 25, 1997, requesting the Audio Services Division to reinstate its application *nunc pro tunc* as of its original filing date.

II.

Publication of the Order in the Federal Register Satisfied the Statutory and Regulatory Public Notice Requirements

CBC claims that because the Allocations Branch failed to release the full text of the *Order* or any Public Notice concerning the *Order*, the Commission's action of October 18, 1996, never became effective, and, thus, no valid application filing window ever opened for the Channel 293A facility at Clifton. Request, p. 4. CBC therefore contends that the Commission must release the full text of the *Order*, specifying new application filing window dates, and publish another summary of the *Order* in the *Federal Register* in order to correct its release date. *Id.* As demonstrated below, however, there is no requirement in either the Communications Act of 1934, as amended (the "Act"), or the Commission's implementing regulations, that the FCC "release" the *Order* in order for it to become effective. Instead, all that is required is that the Commission provide "public notice" of the *Order* allotting Channel 293A to Clifton. See 5 U.S.C. §552(a)(1)(D); 47 U.S.C. §§402(c), 405(a).

In contending that the Commission's October 18, 1996, action never became effective, CBC relies upon Section 1.102(b) of the rules which provides that non-hearing actions taken pursuant to delegated authority shall be effective upon the following:

. . . release of the document containing the full text of such action, *or in the event such a document is not released, upon release of a public notice announcing the action in question.*

47 CFR §1.102(b) (emphasis added).

The Commission has described the term "public notice" in the following manner:

Public notice means legal notice, namely, the notice to the public that is required by the Administrative Procedure Act. The primary purpose of public notice is to formally advise all interested parties and the public of the fact that the Commission or its staff has taken action with respect to some matter.

Addition of New Section 1.103 to the Commission's Rules of Practice and Procedures; Amendments to Section 1.4(b) of Those Rules, 85 FCC 2d 618, 620-21 (1981) ("Addition of Section 1.103").

Broadcast allotment proceedings are rulemakings of general applicability. *Prineville and Sisters, Oregon*, 8 FCC Rcd 4471, 4472 (Policy and Rules Div. 1993). Section 552(a)(1)(D) of the Administrative Procedure Act ("APA") requires each agency to publish in the *Federal Register* the substantive rules of general applicability adopted by the agency. 5 U.S.C §552(a)(1)(D). *See also Prineville*, 8 FCC Rcd at 4472 (*Federal Register* publication of Reports and Orders in broadcast allotment proceedings is required under Section 552(a)(1)(D) of the APA). Accordingly, Section 1.4(b) of the Commission's rules provides in pertinent part:

For purposes of this section, the term *public notice* means the date of any of the following events: . . . (1) For documents in notice and comment rule making proceedings, including summaries thereof, the date of publication in the *Federal Register*.

47 CFR §1.4(b). *See also Addition of Section 1.103*, 85 FCC 2d at 625.

In this case, the Allocations Branch satisfied the statutory and regulatory public notice requirements by publishing a detailed summary of the *Order* in the *Federal Register* on November 6, 1996. Indeed, rather than merely announcing the action in question, the summary contained all of the essential information contained in the *Order*³ and "formally advised all interested parties" that the Commission had allotted Channel 293A to Clifton, Tennessee. Therefore, there is no statutory

³ *See* footnote 2, *supra*.

or regulatory basis for requiring the Commission to “release” the *Order* long after it has gone into effect.⁴

III.

The Order Allotting Channel 293A to Clifton Has Become Final

The date of public notice, as defined in Section 1.4(b) of the rules, also determines the date upon which a Commission order becomes final. *See Addition of Section 1.103*, 85 FCC 2d at 623. The Commission has made clear that the effective date of any Commission action shall be the date of public notice of such action, unless the Commission affirmatively designates a different effective date. Indeed, “[t]he date of ‘issuance’ of a Commission order is deemed to be the date of public notice as defined in Section 1.4(b) of the Commission’s rules.” *Addition of New Section 1.103*, 85 FCC 2d at 620; 47 CFR §1.103(a). *See also Addition of New Section 1.13 to the Commission’s Rules of Practice and Procedure*, 4 FCC Rcd 2092 (1989). In explaining the relationship between the issuance and public notice dates of its orders, the Commission has stated that the primary purpose of Section 1.103(b) of the rules is to “make clear that the statutory terms ‘entry’ of a final order and ‘the date upon which public notice is given’ have the same meaning”, and that Section 1.4(b) will determine the date of finality. *Addition of Section 1.103*, 85 FCC 2d at 623. *See also Western Union Telegraph Co. v. FCC*, 773 F.2d 375 (D.C. Cir. 1985).

Section 405(a) of the Act provides that petitions for reconsideration must be filed within thirty days from the date upon which “public notice” is given of an order. 47 U.S.C. §405(a). *See*

⁴ In accordance with Section 1.103(a) of the rules, the Commission’s *Order* specified an effective date of December 9, 1996. This date complies with Section 553(d) of the APA, 5 U.S.C. §553(d), and Section 1.427 of the rules, which require that the effective date of any rule be at least 30 days after publication in the *Federal Register*. *See Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967).

also *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (1986) (reversing the Commission's acceptance of an untimely petition for reconsideration); *Quincy, Shingle Springs, and Sutter Creek, California*, 7 FCC Rcd 937, 938 (Policy and Rules Div. 1992) (Pursuant to Section 405 of the Act and Sections 1.429(d) and 1.4(b) of the Commission's rules, petitions for reconsideration in rulemaking proceedings must be filed within 30 days of public notice of the summary of the rule-making action in the *Federal Register*). Similarly, Section 1.115(d) of the Commission's rules provides that an application for review of an action taken pursuant to delegated authority must be filed within thirty days "from the date of public notice of such action, as . . . defined in §1.4(b) of these rules." 47 CFR §1.115(d). Accordingly, the Commission has stated that ". . . an interested party need only consult Section 1.4(b) to determine when a Commission action becomes final for purposes of seeking further relief." *Addition of New Section 1.103*, 85 FCC 2d at 622.

In this case, the *Order* was published in the *Federal Register* on November 6, 1996, and, thus, it became final (*i.e.*, no longer subject to reconsideration or review) on Friday, December 6, 1996. Although the Allocations Branch has not properly "released" a full text of the *Order*, this fact has no significance under the Act or the Commission's implementing regulations because the Commission complied with all applicable public notice requirements. Indeed, in a proceeding where a *Report and Order* was released on February 23, 1978, but was published in the *Federal Register* one day *earlier*, the Commission held that the actual, rather than the intended, date of publication was controlling with respect to determining the date of public notice, and, hence, the date of finality. See *Simplification of the Licensing and Call Sign Assignment Systems for Stations in the Amateur Radio Service*, 71 FCC 2d 559, 563-64 (1979). Therefore, because publication of the Commission's *Order* in the *Federal Register* complied with the applicable statutory and regulatory public notice

requirements, and the *Order* has become final, the FCC's Fee Section erred in returning Self's application on the basis that the window period for the filing of applications for the Channel 293A facility in Clifton had not opened.

IV.

Self Was Entitled to Rely on the FCC's Public Notice of Its *Order*,
and Would Be Substantially Prejudiced If the Commission Were To
Re-Issue an *Order* Which Already Has Become Final

In addition to the arguments set forth above, the facts in this case provide an independent, equitable basis for the acceptance of Self's application. As stated above, following publication of the *Order* in the *Federal Register*, Self contacted the staff person identified in the *Order* in an effort to determine whether the Allocations Branch intended to release the *Order* or issue an erratum. Self was advised that the *Order* would not be released, that no erratum would be issued, and that the Branch intended to take no further action because the *Order* had been published in the *Federal Register*. After checking the Commission's files in an effort to ensure that no applications had been filed for the Clifton facility, Self prepared and filed the instant application in reliance upon the fact that the *Order* was final, and with the reasonable expectation that its application would be processed on a first come/first serve basis. If the Commission were to open another application filing window for Channel 293A at Clifton and accept competing applications at some future date, Self would be substantially prejudiced because it would be forced to outbid any mutually exclusive applicants at a public auction in order to obtain a construction permit for the Clifton facility.⁵ Moreover, such a decision by the Commission would violate Section 1.108 of the rules which provides that the

⁵ See Section 3002(a)(1) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), adding Section 309(j) to the Communications Act of 1934 (directing the Commission to grant construction permits for new broadcast facilities to qualified applicants through a competitive bidding process).

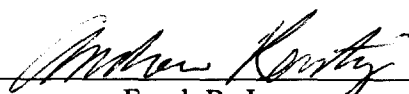
Commission may, on its own motion, "set aside any action made or taken by it *within 30 days from the date of public notice of such action . . .*" 47 CFR §1.108 (emphasis added).

Furthermore, opening another filing window for the Clifton facility would disserve the public interest because it would further delay the commencement of a first local broadcast service at Clifton. Self pledges that if the Commission grants its pending Petition for Reconsideration and reinstates its application *nunc pro tunc* as of its original filing date, upon receiving a grant, Self will promptly commence construction of the new FM facility at Clifton and complete such construction in a timely manner.

WHEREFORE, in light of the foregoing, D. Mitchell Self Broadcasting, Inc., requests that the "Request to Open Application Window," filed by Clifton Broadcasting Company, be DENIED.

Respectfully submitted,

D. MITCHELL SELF BROADCASTING, INC.

By: 
Frank R. Jazzo
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 N. Seventeenth Street, 11th Floor
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(703) 812-0400

September 29, 1997

c:\ask...\jazzo\self\clifton.com

Attachment A

Summary of the Commission's Report and Order,
in MM Docket No. 96-163, Adopted October 18, 1996,
Published in the *Federal Register* on November 6, 1996

11-6-96

Vol. 61

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Wednesday
November 6, 1996

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List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Hawaii, is amended by adding Keaau, Channel 286C2.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96-28441 Filed 11-5-96; 8:45 am]

BILLING CODE 6712-01-P

47 CFR Part 73

[MM Docket No. 96-163; RM-8841]

Radio Broadcasting Services; Clifton, TN

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of D. Mitchell Self Broadcasting, Inc., allots Channel 293A to Clifton, Tennessee, as the community's first local aural transmission service. See 61 FR 42230, August 14, 1996. Channel 293A can be allotted to Clifton in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.6 kilometers (6.6 miles) northwest in order to avoid a short-spacing conflict with the licensed site of Station WBTC (FM), Channel 292C3, Sheffield, Alabama. The coordinates for Channel 293A at Clifton are 35-28-01 and 88-03-11. With this action, this proceeding is terminated.

DATES: Effective December 9, 1996. The window period for filing applications will open on December 9, 1996, and close on January 9, 1997.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 96-163, adopted October 18, 1996, and released

October 25, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857-3800, 2100 M Street, NW, Suite 140, Washington, D.C. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Tennessee, is amended by adding Clifton, Channel 293A.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96-28438 Filed 11-5-96; 8:45 am]

BILLING CODE 6712-01-P

47 CFR Part 73

[MM Docket No. 96-156; RM-8840]

Radio Broadcasting Services; Limon, CO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 229A to Limon, Colorado, as that community's second local FM transmission service, in response to a petition filed on behalf of Roger L. Hoppe, II. See 61 FR 40774, August 6, 1996. Coordinates used for Channel 229A at Limon, Colorado, are North Latitude 39-15-36 and West Longitude 103-41-12. With this action, the proceeding is terminated.

DATES: Effective December 9, 1996. The window period for filing applications for Channel 229A at Limon, Colorado, will open on December 9, 1996, and close on January 9, 1997.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the window application filing process for

Channel 229A at Limon, Colorado, should be addressed to the Audio Services Division, (202) 418-2700.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 96-156, adopted October 18, 1996, and released October 25, 1996. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, located at 1919 M Street, N.W., Room 246, or 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 303, 48 Stat., as amended, 1082; 47 U.S.C. 154, as amended.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Colorado, is amended by adding Channel 229A at Limon.

Federal Communications Commission

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 96-28443 Filed 11-5-96; 8:45 am]

BILLING CODE 6712-01-P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1501, 1503, 1509, 1510, 1511, 1512, 1513, 1516, 1519, 1527, 1532, 1533, 1535, 1542 and 1552

[FRL-5632-4]

Acquisition Regulation; Administrative Changes

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This document makes administrative changes to the EPA Acquisition Regulation (EPAAR), consistent with the Federal Acquisition Streamlining Act (FASA) and other administrative changes.

EFFECTIVE DATE: November 21, 1996.

Attachment B

Letter Dated August 12, 1997, From
Claudette E. Pride, Chief, Fee Section

Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554
August 12, 1997

RE:9707088195392002

D. Mitchell Self Broadcasting, Inc.
600 Avalon Avenue
Muscle Shoals, AL 35662

Dear Sir or Madame:

We are refunding your fee for the following reason(s).

- ☐ Fee paid - No fee required (See block checked "other" for further explanation.)
- ☐ Overpayment
- ☐ Duplicate Payment
- ☐ Incorrect fee - Fee Should be: \$

Your application is being returned. Please resubmit a complete application package according to the appropriate Fee Filing Guide.

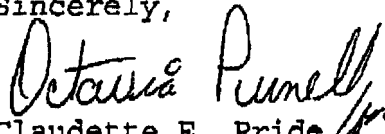
- ☐ Multiple Fee Application - Additional fee required.

Your application is being returned. Please resubmit a complete application package according to the appropriate Fee Filing Guide.

- ☒ Other: Application was filed against a window that hasn't been opened.

Payment is being made through the U.S. Treasury Department. Please allow 8 - 10 weeks for processing. If you have any questions concerning this letter, please contact Octavia Purnell at (202) 418-1995.

Sincerely,


Claudette E. Pride
Chief, Fee Section

CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 29th day of September, 1997, copies of the foregoing "Comments on Request to Open Application Window" were hand-delivered or mailed first-class, postage prepaid, to the following:

John A. Karousos, Chief*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

Ms. Pam Blumenthal*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
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Harold K. McCombs, Jr., Esquire
Duncan, Weinberg, Miller & Pembroke, P.C.
1615 M Street, N.W., Suite 800
Washington, DC 20036
(Counsel for Clifton Broadcasting Company)

Barbara Lyle